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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5176

JEROME FRANKS,

Petitioner,

—v.—

THE STATE OF DELAWARE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF DELAWARE

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

BRUCE J. ENNIS
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016
Attorney for Amicus Curiae

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v.
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Respondent

On Writ of Certiorari to the

Supreme Court of Delaware

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union respectfully moves, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief amicus curiae. Counsel for the Petitioner has consented to the filing of this brief. */ Counsel for the respondent has refused consent.

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*/ A copy of that letter is being filed with the Clerk.

The ACLU is a nationwide, non-partisan organization of over 250,000 members, dedicated to defending the Bill of Rights. Central among those rights are the privacy rights embodied in the Fourth Amendment.

The ACLU has participated in hundreds of cases involving those safeguards, including Mapp v. Ohio, 367 U.S. 643 (1961)(exclusionary rule), Camara v. Municipal Court, 387 U.S. 523 (1967)(probable cause requirement), and United States v. Chadwick, ___U.S.___, 53 L.Ed.2d 538 (1977)(warrant requirement).

The ACLU has a particular interest in this case because the privacy protections reaffirmed in Mapp, Camara, and Chadwick are directly threatened by the respondent's arguments. Essentially, respondent argues that courts need not entertain sub-facial challenges to the validity of search warrants, even when it is alleged, and there is reasonable basis to believe, that the warrant was obtained solely because of knowing and intentional misrepresentations made by police officers. Moreover, we think it important that the Court be provided with research that will not be submitted by either party, challenging the widespread assumption (accepted by the court below) that most courts prohibit sub-facial challenges to the veracity of search warrant affidavits. Finally, this amicus brief argues that this case can be resolved on a narrower ground than either party

will suggest.

In order to present this analysis, the ACLU respectfully moves for leave to file this amicus brief.

Respectfully submitted,

BRUCE J. ENNIS
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorney for Amicus Curiae

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus

The American Civil Liberties Union is a nationwide, nonpartisan organization of over two hundred and fifty thousand members, dedicated to defending the principles embodied in the Bill of Rights to the Constitution.

Central among the protections of the Bill of Rights are the safeguards of privacy set forth in the Fourth Amendment.

In recent years, there have been substantial pressures to weaken the protections of the Fourth Amendment. The ACLU has repeatedly urged the Court to resist the "hydraulic pressures" Justice Douglas warned against in Terry v. Ohio, 392 U.S. 1, 39 (1968), pressures created largely by a perceived overemphasis on the "blunders of constables." This case, however, concerns not mere blunders but a deliberate, flagrant, and material misrepresentation in a sworn police affidavit requesting a search warrant. The right of all Americans "to be secure in their persons, houses, papers and effects" requires a rejection of this latest attack on the constitutional requirement that searches be conducted only on probable cause.

Statement of the Case

This case involves a trial court's refusal to allow a defendant at a state-created suppression hearing any opportunity (let alone a full and fair opportunity) to demonstrate that a facially sufficient affidavit submitted to a magistrate in support of a search warrant was intentionally and materially inaccurate, and that the portions of the affidavit that would remain after excising the intentional and material misrepresentations would not establish probable cause.

The Delaware Supreme Court affirmed, reasoning (1) that no need had been demonstrated for interfering with the magistrate's role in determining the reliability and credibility of affidavits, and (2) that the suppression hearing ought not be turned into an adjudication of guilt or innocence.

Question Presented

Whether the trial court erred in refusing to hear testimony at a suppression hearing which would have shown that material allegations in an affidavit made in support of a search warrant were intentional misstatements.

Summary of Argument

The defendant offered to prove that the search warrant authorizing an invasion of his privacy issued on the strength of an affidavit containing deliberate, intentional and material misstatements of fact. Accordingly, in resolving this case, the Court need not determine the consequences of innocent, negligent, or even reckless misstatements in probable cause affidavits, or the merits of applying the exclusionary rule when police have acted mistakenly, but in good faith.

The search in this case was unreasonable, and in violation of the Fourth Amendment, unless the warrant authorizing the search met the constitutional standard of probable cause. Although the facts on which a search warrant issues need not be accurate, the affiant must have probable cause, defined usually as "a reasonable ground for belief," to believe that they are accurate. Assuming the proffered testimony to be true, the affiants intentionally misstated facts to secure a warrant and therefore could not have had a reasonable belief in the truth of the facts asserted. The search was therefore conducted without probable

cause, in violation of the Fourth Amendment.

A magistrate's ex parte determination that the facts alleged in an affidavit constitute probable cause for a search warrant cannot insulate those factual allegations from subsequent review.

Delaware's refusal to allow the defendant to establish that evidence to be used against him at trial was seized in violation of the Fourth Amendment is inconsistent with Mapp v. Ohio, 367 U.S. 643 (1961) and Stone v. Powell, 428 U.S. 465 (1976). Settled Fourth Amendment law permits defendants to challenge the existence of probable cause for a warrantless search, or to challenge the execution of the search as violative of the warrant's provisions. None of the arguments commonly advanced against permitting sub-facial attacks on probable cause affidavits has merit, or justifies treating defendants who offer to prove that police-affiants intentionally misstated facts differently from defendants advancing other Fourth Amendment claims. No exigencies of law enforcement, or considerations of efficiency, require the immunization of deliberate misstatements in probable cause affidavits from impeachment. The magistrate's ex parte assessment of

credibility and reliability should be no more conclusive than his ex parte determination of reasonableness.

The arguments for permitting sub-facial attacks are so compelling that all eleven federal courts of appeal and, contrary to widespread belief, most state courts reaching the question permit such challenges in the circumstances alleged here.

Enforcement of the Fourth Amendment requires that defendants be permitted to establish intentional Fourth Amendment violations, and that evidence used against them in violation of the Fourth Amendment be excluded from their trials.

ARGUMENT

THE FOURTH AMENDMENT REQUIRES THAT DEFENDANTS BE AFFORDED AN OPPORTUNITY TO IMPEACH INTENTIONAL AND MATERIAL MISREPRESENTATION IN SEARCH WARRANT AFFIDAVITS.

Introduction

Assuming, as we must, the truth

of the testimony proferred but not received at the suppression hearing, Delaware's law enforcement officers clearly violated the defendant's Fourth Amendment rights.1/ Police officers established probable cause for a search warrant only by deliberately falsifying affidavits. The framers of the Fourth Amendment, who required that warrants be supported by sworn affidavits, did not intend to authorize invasions of personal privacy on the basis of falsely sworn affidavits.

Delaware's attempt to shade this category of Fourth Amendments violations from the disinfecting light of judicial review is particularly disturbing because this case does not raise the

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1/ The Delaware Supreme Court, like other courts which refuse defendants an opportunity to impeach false search warrant affidavits, did not dispute that petitioner's Fourth Amendment rights may have been violated; it simply declined to permit the violation to be established, or remedied, in the course of criminal proceedings.

difficult issues of Fourth Amendment remedies that have seriously divided the Court in recent years. Before turning to our arguments on the merits, we think it important to emphasize four issues this case does not raise, and which the Court need not resolve:

First, this case does not concern innocent errors of policemen unschooled in the intricacies of Fourth Amendment law, and it therefore provides no occasion to renew the troubled debate over application of the exclusionary rule when police officers have acted "mistakenly, but in good faith and on reasonable grounds." Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting).

Second, this case does not require examination of the deterrent value of the exclusionary rule on collateral review.

Third, this case raises no questions concerning the government's privilege to withhold the identities of informers, McCray v. Illinois, 386 U.S. 390 (1967), or the Fourth Amendment consequences of the negligent or even knowing use by law enforcement personnel of misrepresentations by informers to

establish probable cause.2/

Finally, because the defendant offered to prove that the police affidavit contained deliberate, intentional, and material misrepresentations,3/ the Court need not decide the Fourth

2/ Although the issue need not be resolved in this case, we note that problems relating to impeaching informer's statements are discussed in Herman, "Warrants for Arrest or Search: Impeaching the Allegations of a Facially Sufficient Affidavit," 36 Ohio St. L.J. 721, 742-46 (1975) (hereafter cited as Herman).

3/ The trial court refused to permit petitioner's witnesses to state on the record what the substance of their testimony would be. See Appendix at 25-26. This Court must therefore rely on counsel's offer of proof. That offer plainly stated that the defendant would prove that the police deliberately and intentionally made false and material allegations in the affidavit in support of the search warrant. The materiality of the allegations in question has never been disputed by the state. The offer of proof is stated various ways, Appendix at 15, 16, 22-26. The substance of the offer is best summarized as follows:

Mr. Finocchiaro:
Your Honor, I intend to produce Mr. Wesley Lucas of the Delaware Youth Center, who I believe will give information that will intend [sic] to impeach the information contained in the affidavit, not only as to its accuracy but to the fact it was never given and as such there may have been a rather material misrepresentation made by either one or both of the affiants contained in the search warrant. In addition, I would like to call Officer McClements to the stand.
The Court: That would be of what paragraph? Paragraph 15?
Mr. Finocchiaro: Yes. Paragraphs 15, 16 and 17.
The Court: And what they would testify to would rebut what is in Paragraph 15, 16 and 17?
Mr. Finocchiaro: Would rebut not only certain factual matters but also as to whether or not it was given and to whom it was given. . . .

Appendix at 16.

Amendment implications of innocent, negligent, or even reckless misstatements.4/ The issue presented to the

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4/ See, e.g., Robinson v. Kentucky, No. 77-362, cert. denied, Oct. 31, 1977, ____ U.S. ____, 46 U.S.L.W. 3286 (letting stand ruling that inadvertent misstatements can establish probable cause). The circuit courts have split on the culpability required for suppression. Compare, e.g., United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973) (en banc) (invalidating only intentional and reckless misstatements, where material) with United States v. Thomas, 489 F.2d 664 (5th Cir. 1973), cert. denied, 423 U.S. 844 (1975) (leaving open the possibility that material negligent misstatements would invalidate warrant). The issue is canvassed in Herman, supra n.2 at 746-50. Because the petitioner offered to prove that the affidavit contained material, intentional misstatements, and because a concrete factual setting is especially important to analyze the Fourth Amendment implications of sworn allegations where the affiant's belief in their truth is not reasonable, we urge the Court to decide only the narrow issue here presented. We note, however, the similarity of the Fourth Amendment's

Court is a narrow one, involving an extremely serious claim that the police deliberately submitted false affidavits. This case thus presents the paragidmatic situation of officials whose intentional misconduct violates the constitutional rights of defendants, and the integrity of the courts. The sharpest critics of the exclusionary rule have indicated they would preserve it for just such deliberate and flagrant violations of settled Fourth Amendment rights. See, e.g., Brewer v. Williams, ___ U.S. ___ (1977), 51 L.Ed.2d 424, 450 (Burger, J., dissenting); Stone v. Powell, 428 U.S. at 538 (White, J., dissenting). All

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reasonableness standard with the "reasonable man" negligence standard of the law of torts, suggesting that statements negligently made - that is, made without a reasonable degree of care - cannot amount to probable cause, which implies a "reasonable ground for belief." See, Brinegar v. United States, 338 U.S. 160, 175 (1949). Throughout this brief, unless otherwise indicated, we will interchangeably use "misrepresentations" and "misstatements" in the meaning this case presents - statements which are intentionally and deliberately falsely sworn.

eleven federal courts of appeal, and, contrary to widespread belief, most state courts considering the question, are agreed that, in the circumstances alleged below, sub-facial attacks on the veracity of search warrants must be permitted.5/ Immunization of falsely sworn probable cause affidavits from impeachment at or prior to trial would remove a critical deterrent to official falsehood, would nullify the Fourth Amendment's requirement that warrants issue only on probable cause, and would destroy a significant portion of the right of privacy the Fourth Amendment was designed to secure.

A. A Search Pursuant to a Warrant Based on Intentional and Material Misrepresentations is a Search Without Probable Cause, in Violation of the Fourth Amendment.

The Fourth Amendment contains both a guarantee of individual privacy against unreasonable searches and

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5/ See infra nn. 22-27.

seizures,6/ and a mechanism to implement that guarantee. It is now "axiomatic" that the warrant requirement, designed to insure that invasions of privacy are undertaken only on the constitutionally required showing of probable cause, is critical to the protection of individual privacy.7/ This Court has consistently recognized that the essence of the protection afforded by the Fourth Amendment lies in the determination by a disinterested magistrate that probable cause exists. 8/

6/ Feldman v. United States, 322 U.S. 487, 489-90 (1944); see also Mapp v. Ohio, 367 U.S. 643, 655, 657 (1961); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

7/ Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring).

8/ E.g., United States v. United States District Court, 407 U.S. 297 (1972); Katz v. United States, 389 U.S. 347 (1967); Camara v. Municipal Court, 387 U.S. 528-29 (1967); Johnson v. United States, 333 U.S. 10, 13-14 (1948). South Dakota v. Opperman, 328 U.S. 364 (1976), and United States v. Ramsey,

The probable cause requirement embodies the constitutional judgment that searches are reasonable only when the law enforcement officer has a reasonable belief that items seizable by virtue of connection with criminal activity will be in the place to be searched.9/ The probable cause requirement, together with the Fourth Amendment's command of particularity and its warrant requirement, protect the privacy of innocent persons, and the privacy of arguably guilty persons in matters unrelated to crimes for which

U.S.____(1977), 52 L.Ed.2d 617 (1977) are not to the contrary. In both those cases, the Court justified warrantless searches on less than probable cause because the searches were in non-criminal contexts and were "unrelated to the criminal investigative-enforcement process." See, e.g., South Dakota v. Opperman, 428 U.S. at 370 n.5. This Court's decisions uniformly hold that a search in the circumstances of this case is unconstitutional unless based on probable cause.

9/ United States v. Old Dominion Warehouse, 10 F.2d 736 (2d Cir. 1926) (Hand, J.).

the police have probable cause to search.10/ Chimel v. California, 395 U.S. 752, 767 n.12 (1969).

The constitutional judgment that searches are permissable only on "probable cause" does not brand searches as unreasonable whenever facts relief on by the officer or by the magistrate turn out on later examination to be incorrect:

> Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.

Brinegar v. United States, 338 U.S. 160, 175-76 (1949). See also, Gerstein v. Pugh, 420 U.S. 103, 112 (1975).

10/ See Herman, supra n.2, at 742-46.

Nonetheless, under the probable cause standard, which the Court has described as a "minimum requirement,"11/ a warrant cannot issue unless a law enforcement officer has a reasonable belief that the facts warrant a search12/ and, lacking exigent circumstances, submits the facts on which he relies for objective determination by a disinterested magistrate. Johnson v. United

11/ "The Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution." Chambers v. Maroney, 399 U.S. 42, 51 (1970). See also, United States v. Ortiz, 422 U.S. 891, 896 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 269-70 (1973); Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

12/ In Dumbra v. United States, 268 U.S. 435 (1925), the Court indicated that an affiant must himself have a reasonable belief in the truth of the facts asserted in the probable cause affidavit:

> In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds

States, 333 U.S. 10, 14 (1948); United States v. Lefkowitz, 285 U.S. 452 (1932). Accordingly, although an officer's good faith belief that probable cause exists may be a factor in determining whether he can be held liable in damages for a search conducted without probable cause (e.g., Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1347-48 (2d Cir. 1972), on remand from 403 U.S. 388 (1971)) an officer's (or magistrate's) good faith belief that probable cause existed cannot justify a search where probable cause did not in fact exist. Hill v. California, 401 U.S. 797, 804 (1971). Instead, the Court has consistently held that evidence seized in the course of searches for which probable cause has not been properly established must be suppressed, both when the magistrate wrongly assessed the sufficiency of the affidavits presented, Aguilar v. Texas, 378 U.S. 108 (1964), and when a warrantless arrest or search lacked the necessary probable

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> at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched.

268 U.S. at 441 (emphasis added).

cause, Whitely v. Warden, 401 U.S. 560, 566-69 (1971).

Thus, in Whitely v. Warden, a magistrate issued an arrest warrant on the strength of a facially insufficient affidavit. Upon hearing a bulletin announcing issuance of the warrant, an officer arrested the defendant, searched him and found incriminating items. After this Court held that the arrest warrant was facially insufficient, and that the search incident to that arrest was therefore invalid, it rejected as well the state's argument that the search was a reasonable warrantless search because the arresting officer acted reasonably, and therefore constitutionally, in relying on the radio bulletin:

> Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the

arrest.13/

401 U.S. at 568.

Similarly, lower courts have consistently read Whitely to require probable cause, not simply an officer's reasonable belief that probable cause exists, to justify a warrantless search under exigent circumstances.14/

13/ Apparently, the Court's holding on this point was unanimous. None of the dissenters in Whitely argued that an arrest lacking probable cause could be found constitutional because of the reasonableness of reliance on a warrant based on an insufficient affidavit; Justice Black's dissent contended instead that the arresting officer had probable cause to arrest, independent of the warrant which Justice Black assumed, arguendo, to be invalid.

14/ E.g., Weeks v. Estelle, 509 F.2d 760 (5th Cir. 1975); United States v. Murray, 492 F.2d 178, 188 (9th Cir. 1973).

The Court's approach in Whitely is precisely the approach required by the Fourth Amendment in this case:

> Certainly [a magistrate is] entitled to assume that the officers requesting aid offered [him] the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal [search] cannot be insulated from challenge by the decision of the [magistrate] to rely on [information supplied by the officers].

It is settled that a magistrate's unreasonable inference drawn from facts which officers reasonably believe cannot justify a search when those facts do not establish probable cause; yet Delaware here urges that a magistrate's reasonable inference from facts which officers do not reasonably believe should somehow suffice. This result is entirely inconsistent with the Fourth Amendment. As a leading commentator has written:

> It is true that, of the various functionaries who participate in the probable-cause and warrant-issuing

processes, the magistrate is supposed to play a unique role. The assumption underlying the warrant clause of the fourth amendment is that innocent privacy will be jeopardized if the probable-cause process (the very core of the fourth amendment) is entrusted solely to law enforcement officers who, ". . . in the often competitive enterprise of ferreting out crime," are likely to draw every inference and resolve every doubt in favor of taking intrusive action. To safeguard innocent privacy, we therefore insist that a "neutral and detached" magistrate draw the inferences and resolve the doubts. But the importance of this function should not blind us to the fact that it is only a part of the probable-cause process, and the final part, at that. The antecedent parts are the acquisition and transmission of the very information that the magistrate must evaluate. These parts cannot feasibly be administered by the magistrate and must therefore be entrusted to law enforcement officers. That we assign

different parts of the probable-cause process to different functionaries is hardly reason for viewing either the parts or the functionaries in isolation. It does not trivialize the magistrate's inference-drawing task to say that it is no more important than the officer's task of acquiring information and transmitting it to the magistrate. Indeed, it makes utterly no sense to ask only whether the magistrate drew a reasonable inference without asking whether the information from which he drew the inference was acquired carelessly or transmitted inaccurately. Probable cause and its process are a whole. If any part is defective, if any functionary performs improperly, the whole fails, thereby increasing the risk of invading privacy and subverting the fourth amendment's primary value.

When a court is concerned only with whether the magistrate had probable cause (that is, whether the magistrate properly performed his role), it indicates either that it does not understand the multifaceted nature of probable

cause and its process or that it does not understand that each part is as important as any other. Sub-facial attacks are intended to expose the malfunctioning of the law-enforcement part, but no less to assert the total failure of probable cause and the consequent risk to innocent privacy. When a court prohibits sub-facial attacks by dropping an iron curtain between magistrate and affiant, it fragments the process to such an extent that the sum of the parts no longer equals the whole. To the same extent it diminishes the protection that innocent privacy is constitutionally entitled to receive.

Herman, supra n.2, at 739-40 (footnotes omitted).

B. Sub-facial Challenges Alleging Intentional Misstatement Should Be Permitted.

Just two years ago, seven members of this Court agreed that the Fourth Amendment requires "implementation of the exclusionary rule at trial and its

enforcement on direct appeal of state-court convictions." Stone v. Powell, 428 U.S. 465 (1976).15/ Even the two Justices who would have abolished the exclusionary rule where "the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for this belief" noted that it should be enforced in cases, such as this case, where the police acted without a reasonable, good-faith belief that their actions were permissable. Stone v. Powell, 428 U.S. at 538 (White, J., dissenting); Id., at 501-502 (Burger, J., concurring).16/

15/ The exclusionary rule was applied last Term in United States v. Chadwick, ___U.S.___, 53 L.Ed.2d 538 (1977).

16/ This distinction, which rests on such cases as Elkins v. United States, 364 U.S. 206 (1960), Olmstead v. United States, 277 U.S. 438 (Brandeis and Holmes, JJ., dissenting), has been justified by Professor Wright as follows:

> It is demeaning to the Courts and to the legal system if convictions can rest on blatant disregard by the police of the constitutional rights of our people.

Delaware's refusal to allow testimony at the suppression hearing which would have established that the affidavits contained intentional and material misstatements was inconsistent wtih Stone, which held that states are required to determine whether evidence to be used at trial was seized in violation of the Fourth Amendment. United States ex rel. Petillo v. New Jersey, 418 F. Supp. 686 (D.N.J. 1976).

As we shall now demonstrate, none of the commonly advanced arguments against permitting sub-facial challenges has merit. There is no principled justification for treating the violation of petitioner's Fourth Amendment rights differently from other search and seizure challenges, all of which can be considered at trial and on direct review.

1. There are no compelling reasons for prohibiting sub-facial challenges.

a. The importance of the violation.

Wright, "Must the Criminal Be Free if the Constable Blunders?," 50 Tex. L. Rev. 736, 744 (1972).

First, petitioner's claim is at least as threatening to Fourth Amendment values as are other claims which settled law requires courts to hear. It is instructive to compare the defendant's situation under the rule adopted by the Delaware Supreme Court with that of three hypothetical defendants. Defendant A moves to suppress evidence seized in a warrantless search which police claim was incident to a lawful, but warrantless, arrest.17/ Defendant B moves to suppress evidence which police claim was seized in hot pursuit.18/ Defendant C moves to suppress evidence seized pursuant to a valid warrant on the ground that the evidence was seized upstairs (which the police deny) and the warrant only authorized a downstairs search. Defendants A, B, and C are entitled to present witnesses at a suppression hearing to prove that the facts were not as the police asserted. But under the decision below, petitioner could not present witnesses to prove that the facts were not as the police alleged, even though the police had

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17/ Cf., McCray v. Illinois, 386 U.S. 300 (1967).

18/ Cf., Warden v. Hayden, 387 U.S. 294 (1967).

falsely and intentionally sworn to those facts before a magistrate, and had thereby abused and corrupted the judicial process. As Judge Friendly has observed, "the objectives [of the Fourth Amendment] are not accomplished if the judicial officer is put upon by the police." United States v. Dunnings, 425 F.2d 836, 840 (2d Cir. 1969). Surely intentional misstatements that are used to perpetuate a fraud upon the courts are a greater threat to Fourth Amendment values than the police conduct at issue in hypotheticals A, B, and C. It follows that the conduct at issue in this case must be subject to at least the same degree of judicial review as is presently available in hypotheticals A, B, and C.

b. Exigencies of law enforcement.

No exigencies of law enforcement, or meaningful considerations of efficiency, require the immunization of false probable-cause affidavits. This is not a case, like Terry v. Ohio, 392 U.S. 1 (1968) or Chambers v. Maroney, 399 U.S. 42 (1970), where compelling law enforcement needs justify striking a new balance of Fourth Amendment "reasonableness." The only practical effect which sub-facial challenges to false affidavits can have on police behavior is to deter intentional

misrepresentations. States are already under an obligation to hear Fourth Amendment claims, which often require witnesses. These claims are currently resolved at suppression hearings, or at trial, as a matter of course. Accordingly, permitting sub-facial challenge to allegedly intentional police misstatements would not require the creation of a new judicial mechanism, would not unduly strain judicial resources, and would not create new rules that might confuse or complicate law enforcement efforts.

c. The magistrate's function.

Requiring trial courts to afford defendants an opportunity to challenge search warrant affidavits would not interfere with or demean the magistrate's function. Although the court below mentioned in passing that a magistrate's function includes weighing the credibility and reliability of search warrant affidavits, it did not rule, as a matter of state or federal law, that a magistrate is required to conduct an independent investigation of the truth or falsity of factual allegations in the affidavits. And there is no indication in the record of this case that such an investigation was, in fact, conducted. To the contrary, no witnesses were called or

examined, no transcript was made, and the warrant issued almost immediately. Furthermore, even if there had been some investigation, it is impossible fully to assess credibility and reliability in an ex parte hearing.19/

19/ The experience of other courts strongly suggests that falsified warrants frequently slip past magistrates. See, e.g., United States v. Harwood, 470 F.2d 322, 324-25 (10th Cir. 1972); United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971), cert. denied, 405 U.S. 934 (1972); United States ex rel. Petillo v. New Jersey, 400 F. Supp. 1152 (D.N.J. 1975), vacated, 541 F.2d 275, reinstated, 418 F. Supp. 686 (1976); State v. Spero, 371 A.2d 1155 (N.H. 1977). For this reason, the American Law Institute recommends that challenges to the veracity of probable cause affidavits should be permitted:

> The reason is that the proceeding before the issuing magistrate is ex parte; the record made before him is not of the same probative value as the record of a trial, and is therefore not entitled to be treated like a record on appeal. To put the matter another way, what is 'right' for an issuing magistrate to do on the basis of an ex parte record may not be what is right for the court to do on the basis of an adversary proceeding on motion to suppress. To conclude otherwise, and immunize the warrant fair on its face from factual challenge, would be to preserve pro tanto the ex parte character of the proceeding on issuance.

ALI, Model Code of Pre-Arraignment Procedure, Part II - Commentary, SS § 290.3 at 570 (1975). The relevant statutory provision is Part II-Statute, SS § 290.3. As this Court stated in Alderman v. United States, 394 U.S. 165, 183-84: "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity . . . will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands."

The basic point, however, is that ordinarily the ex parte review by the magistrate does not involve a hearing. Because of the need for speed, most warrants issue almost immediately, as a matter of course.20/

Furthermore, even if a magistrate has conducted an ex parte review or hearing, permitting a subsequent plenary review is not at all unseemly or unnecessary.21/

20/ One important function of probable cause affidavits may be to establish and "freeze" a record upon which the existence of probable cause can later be decided at an adversary hearing. Jones v. United States, 6 Crim. L. Rptr. 2124 (D.C. Cir. 1964), rev'd on rehearing on other grounds sub nom. Dorman v. United States, 435 F.2d 385 (D.D. Cir. 1970) (Leventhal, J.); Miller and Tiffany, "Prosecutor Dominance of the Warrant Decision," 1964 Wash. U.L.Q. 1, 13 (1964).

21/ An issuing magistrate seldom inquires into the truth of a facially sufficient affidavit. Consequently it is inaccurate to treat a sub-facial attack at a suppression hearing as a review of the issuing magistrate's decision. Rather, it is an inquiry of first in-

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stance. Finally, the defendant is permitted, at a suppression hearing, to attack the facial sufficiency of the affidavit even though the issuing magistrate has already resolved that issue. If the suppression judge agrees with the defendant, he is saying that the magistrate erred on a matter of law in issuing the warrant -- that is, that he stupidly or unreasonably issued it. Can it be more unseemly if the suppression judge holds that the magistrate was deceived by a facially sufficient, but untrue, affidavit?

Herman, supra n.2, at 721, 724-25 (1975). As for the Delaware Supreme Court's contention that the falsity of affidavits properly belongs to trial on the merits because "neither the probable cause nor suppression hearings are adjudications of guilt or innocence," with all respect we are at a loss to understand what this means. See Herman, supra n.2, at 725, text accompanying notes 23-24. Although the veracity of the search warrant affidavits may conceivably be relevant at trial for the purpose of undermining the credibility of the affiant, if he

d. The experience of other jurisdictions.

Most courts faced with this issue have recognized that compelling Fourth Amendment considerations require that defendant be permitted to challenge search warrant affidavits. In a rare display of unanimity, each of the

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testifies, it has a wholly different and crucial relevance at the probable cause or suppression hearing: namely, to negative the existence of probable cause, thereby resulting in suppression of seized evidence. Although it is not the function of criminal proceedings to punish Fourth Amendment violations, the Fourth Amendment is designed to restrain police from unreasonably invading privacy in their search for evidence to be used at a criminal trial.

federal courts of appeal has either held,22/ or indicated that it would

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22/ United States v. Belculfine, 508 F.2d 58, 63 (1st Cir. 1974); United States v. Gonzalez, 488 F.2d 837-38 (2d Cir. 1973) (by implication); United States v. Pond, 523 F.2d 210, 213, 214 (2d Cir. 1975) (by implication), cert. denied, 423 U.S. 1058 (1976); King v. United States, 282 F.2d 398, 400-01 (4th Cir. 1960); Wrenn v. North Carolina, 486 F.2d 1399 (4th Cir. 1973) (mem.), cert. denied, 417 U.S. 973 (1974); United States v. Thomas, 489 F.2d 664, 669 (5th Cir. 1973), cert. denied, 423 U.S. 844 (1975); United States v. Luna, 525 F.2d 4, 8 (6th Cir. 1975), cert. denied, 424 U.S. 965 (1976); United States v. Carmichael, 489 F.2d 983, 988-89 (7th Cir. 1973) (en banc); United States v. Marihart, 492 F.2d 897, 899-900 (8th Cir.), cert. denied, 419 U.S. 827 (1974); United States v. Damitz, 495 F.2d 50, 54 (9th Cir. 1974); United States v. Harwood, 470 F.2d 322-24 (10th Cir. 1972).

hold when the opportunity arose, 23/ that sub-facial challenges to probable cause affidavits must be permitted. And, contrary to widespread belief,24/ a majority of the state courts that have considered the question either

23/ United States v. Armocida, 515 F.2d 29, 40-41 (3d Cir.), cert. denied, 423 U.S. 858 (1975); United States v. Thornton, 454 F.2d 957 (D.C. Cir. 1971). Leading district court opinions include United States ex rel. Petillo v. New Jersey, 400 F. Supp. 1152 (D.N.J. 1975), vacated, 541 F.2d 275 (3rd Cir. 1976), reinstated, 418 F. Supp. 686 (1976) (Stern, J.); United States v. Halsey, 257 F. Supp. 1002 (S.D.N.Y. 1966) (Frankel, J.).

24/ E.g., North Carolina v. Wrenn, 417 U.S. 973, 975 (1974) (White, J., and Burger, C.J. dissenting), denying cert. to 486 F.2d 1399 (4th Cir. 1973); Kipperman, "Inaccurate Search Warrants as a Ground for Suppressing Evidence," 84 Harv. L. Rev. 824 (1971).

permit such challenges,25/ or have implied, by holding that the necessary

25/ Cases unequivocally holding that facially sufficient affidavits may be impeached are collected in Comment, "Challenges to the Veracity of Facially Sufficient Warrants--Is the Truth Relevant?," 7 Seton Hall L. Rev. 827, 843 n.92 (1976)[hereinafter cited as Comment] as follows:

"McConnell v. State, 48 Ala. App. 523, 527-28, 266 So. 2d 328, 332-33 (Crim. App. 1972); Davenport v. State, 515 P.2d 377, 380 (Alas. 1973); State v. Boyd, 224 N.W.2d 609, 616 (Iowa 1974); State v. Melson, 284 So. 2d 873, 874-75 (La. 1973); Commonwealth v. Hall, 451 Pa. 201, 204, 302 A.2d 342, 344 (1973); State v. Sachs, 264 S.C. 541, 556, 216 S.E.2d 501, 509 (1975); State v. Manly, 85 Wash. 2d 120, 530 P.2d 306, cert. denied, 423 U.S. 855 (1975)."

As of 1976, four states permitted impeachment as a matter of statutory interpretation, Comment at 843 n.94:

"Theodor v. Superior Court, 8 Cal. 3d 77, 90, 501 P.2d 234, 243, 104 Cal. Rptr. 226, 235 (1972)(en banc); People v. Alfinito, 16 N.Y.2d 181, 186, 211 N.E.2d 644, 646, 264 N.Y.S.2d 243, 246 (1965);

threshold showing to warrant a hearing had not been made, that they would permit challenges on proper showings,26/

State v. Wright, 511 P.2d 1223, 1225-26 n.3 (Ore. 1973)(en banc); State v. Bankhead, 30 Utah 2d 135, 138, 514 P.2d 800, 802 (1973)."

Amicus has found three more states that have joined the growing movement toward permitting sub-facial attacks: O'Bean v. State, 184 So. 2d 635, 638-39 (Miss. 1966); State v. Luciow, 240 N.W.2d 833, 837 (Minn. 1976); State v. Spero, 371 A.2d 1155 (N.H. 1977). The Alabama Supreme Court has let stand the lower court ruling cited above, 289 Ala. 746, 266 So. 2d 334 (1973).

26/ Cases upholding warrants against sub-facial challenges on the ground that any alleged or demonstrated inaccuracies were either unintentional, immaterial, or both, are collected in Comment, supra n.25, at 843 n.93 as follows:

"State v. Sabari, 109 Ariz. 553, 555-56, 514 P.2d 474, 476-77 (1973); Williams v. State, 232 Ga. 213, 213-14, 205 S.E.2d 859, 860 (1974); State v. Baca, 84 N.M. 513, 515, 505 P.2d 856, 858 (1973); State v. Vance, 25 N.C. App. 92, 94,

A lesser number of states flatly prohibit such challenges, or have older court decisions which indicate that such challenges might be prohibited.27/

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212 S.E.2d 249, 250, cert. denied, 287 N.C. 264, 214 S.E.2d 436 (1975); State v. Dodson, 43 Ohio App. 2d 31, 36, 332 N.E.2d 371, 375 (1974); Scott v. State, 73 Wis. 2d 504, 243 N.W.2d 215 (1976). See also State v. Koucoules, 343 A.2d 860, 864-65 n.3 (Me. 1974)."

One more state court has implied that impeachment would be permitted on a proper showing: State v. Sanders, 222 Kan. 189, 563 P.2d 461, 466-67 (1977) (alternate holding).

27/ States which deny opportunity to impeach facially sufficient warrants are collected in Comment, supra n.25, at 843 n.95 as follows:

"Liberto v. State, 248 Ark. 350, 356-57, 451 S.W.2d 464, 463 (1970) (alternative holding); State v. Anonymous, 30 Conn. Supp. 211, 219, 309 A.2d 135, 147 (Super. Ct. 1973); People v. Bak, 45 Ill. 2d 140, 146, 258 N.E.2d 341, 344, cert. denied, 400 U.S. 882 (1970);

Caslin v. Commonwealth, 491 S.W.2d 832, 834 (Ky. 1973); Tucker v. State, 244 Md. 488, 499-500, 224 A.2d 111, 117-18 (1966), cert. denied, 386 U.S. 1024 (1967); State v. Petillo, 61 N.J. 165, 178-79, 293 A.2d 649 (1972), cert. denied, 410 U.S. 945 (1973); Owens v. State, 217 Tenn. 544, 553, 399 S.W.2d 507, 511 (1965). See also State v. English, 71 Mont. 343, 347-48, 229 P. 727, 729 (1924) (dictum).

"Additionally, there are a number of state cases that can be interpreted as prohibiting inquiry into the underlying truth of statements in a search warrant affidavit, but it is not clear whether they specifically involved challenges to the truth of an affiant's statements. It appears that in these cases the defense was objecting to the conclusory nature of the affiant's statements, rather than attempting to challenge their underlying truth. See, e.g., Seager v. State, 200 Ind. 579, 581-82, 164 N.E. 274, 275 (1928); State v. Brogioni, 320 Mo. 202, 206-07, 7 S.W.2d 262, 263 (1928); Baker v. State, 448 P.2d 282, 283 (Okla. Crim. App. 1968); State v. Seymour, 46 R.I. 257, 258-60, 126 A. 755, 756 (1924)."

See also Phenix v. State, 488 S.W.2d

There is therefore widespread judicial recognization that the Fourth Amendment requires states to permit defendants to challenge facially sufficient search warrants. That fact, together with universal approval by commentators,28/

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759 (Tex. Cr. App. 1973). Amicus notes that Connecticut and Oklahoma have recently reaffirmed their holdings. State v. Williams, 169 Conn. 322, 363 A.2d 72 (1975); Brown v. State, 565 P.2d 697 (Okla. Cr. App. 1977).

The breakdown of state jurisdictions considering the issue is therefore as follows: fourteen states permit challenge; eight have implied that they would permit challenge on a proper showing; as few as nine, or as many as thirteen, prohibit sub-facial attacks.

28/ E.g., Forkosh, The Constitutional Right to Challenge the Content of Affidavits in Warrants Issued Under the Fourth Amendment, 34 Ohio S.L.J. 297 (1973); Grano, A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury, 1971 U. Ill. L.F. 405; Herman, Warrants for Arrest or Search: Impeaching the Allegations of a Facially

Sufficient Affidavit, 36 Ohio S.L.J. 721 (1975); Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harv. L. Rev. 824 (1971); Mascolo, Impeaching the Credibility of Affidavits for Search Warrants: Piercing the Presumption of Validity, 44 Conn. B.J. 9 (1970); Comment, Challenges to the Veracity of Facially Sufficient Warrants - Is the Truth Relevant?, 7 Seton Hall L. Rev. 827 (1976); Comment, Controverting Probable Cause in Facially Sufficient Affidavits, 63 J. Crim. L.C. & P.S. 41 (1972); Comment, The Outwardly Sufficient Affidavits: What If It's False?, 19 U.C.L.A.L. Rev. 96 (1971); Note, Search Warrant Affidavits - The Constitutional Constraints, 23 Drake L. Rev. 623 (1974).

demonstrates that such challenges can be permitted without impairing legitimate state interests.29/

29/ Cf., Chimel v. California, 395 U.S. 752, 769 (1969) (Harlan, J., dissenting).

Some courts have held that although the Fourth Amendment requires sub-facial challenges, the costs in terms of judicial time and energy justify limiting such challenges to defendants who make a sufficient preliminary showing. E.g., United States v. Belcufine, 508 F.2d 58 (1st Cir. 1974); United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973)(en banc); United States v. Halsey, 257 F. Supp. 1002 (S.D.N.Y. 1966). See also, Model Code of Pre-Arraignment Procedure, SS § 290.3(1)(b) (1975). The arguments against such a requirement, or at least against its most severe forms, are convincingly presented by Professor Herman, supra n.2, at 721, 756-59 (1976). However, because the offer of testimony made by petitioner at the suppression hearing plainly satisfies the most demanding standards suggested, the Court need not and should not decide on this record whether states may deny hearings on lesser showings. Amicus urges the Court to defer ruling

2. Compelling Fourth Amendment considerations support sub-facial challenges.

If, as we have argued, a warrant which issues on the basis of material and intentional misstatements cannot justify a search, then settled law requires that evidence seized in that search cannot be introduced against the defendant at trial. Mapp v. Ohio, 367 U.S. 643 (1961); Stone v. Powell, 428 U.S. 493 (1976). Although this case does not directly involve the exclusionary rule itself, we think it important to emphasize that the exclusionary rule is directed not only at illegal police conduct, but also at the violation of constitutional liberties by the entire criminal justice system. Thus, the exclusionary rule is not a sanction directed solely at

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on that issue until it has the benefit of wider experience under a variety of state rules. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1937) (Brandeis, J., dissenting). Cf., Shaefer, "The Fourteenth Amendment and Sanctity of the Person," 64 N.W.U.L. Rev. 1, 7-11 (1969).

the individual police officer, either by its terms or by its effect. The rule exists to enforce the Fourth Amendment throughout the criminal justice system, from the officer on the beat, to the prosecutor, to the trial judge. Weeks v. United States, 232 U.S. 383, 391-92 (1914).

A leading law review article on the exclusionary rule has pointed out that courts and police officers are not

> moral strangers . . . but . . . parts of the same government and parties to the same governmental course of conduct and, indeed, neither a criminal court nor a law enforcement officer makes sense in isolation of the other. A criminal court is not an intelligible institution without the expectation that it will receive evidence from which to synthesize verdicts and judgments. By the same token, a policeman--e.g., the marshal in Weeks--may be out in the field, but his being out there in a law enforcement, as opposed to some administrative, capacity is only intelligible on the expectation that he will come in to court.

Thomas S. Schrock and Robert C. Welsh, "Up from Calandra: The Exclusionary Rule as a Constitutional Requirement," 59 Minn. L. Rev. 251, 300 (1974).

The Fourth Amendment requires probable cause at every stage of the criminal justice process. As Professor Herman has observed:

> . . . In a case involving a warrant, the process has three parts: acquisition of information, transmission to a magistrate, and evaluation by the magistrate. Each part, no less than the others, plays a vital role in serving fourth amendment goals.

Facial attacks-the validity of which has never been questioned-assert the malfunctioning of the evaluation part. Sub-facial attacks implicate the other parts, primarily transmission. Given the equally crucial role played by each part, sub-facial attacks should, as a matter of fourth amendment law, be permitted without restriction, for they go to the very heart of the protection of privacy. Prohibiting sub-facial attacks or

> imposing restrictions that are functionally equivalent to prohibition "reduces the Fourth Amendment to a form of words."

Herman, supra n.2 at 760, citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

CONCLUSION

In the circumstances of this case, the Court below erred in denying the defendant an opportunity to challenge the veracity of material allegations in an affidavit used to establish probable cause to search.*

Respectfully submitted,

BRUCE J. ENNIS
c/o American Civil
Liberties Foundation
22 East 40th Street
New York, NY 10016
212-725-1222

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